In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4072

MARTIN ROZEMA, Assignee of the Judgment of THE HALE COMPANY, a corporation, against INTERNATIONAL TRADING COMPANY OF AMERICA, a corporation, *Plaintiff in Error*

vs.

THE NATIONAL CITY BANK OF SEATTLE, a National Banking Corporation, Garnishee Defendant, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF PLAINTIFF IN ERROR

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It will be noted that the only objection raised by defendant in error to our statement of the facts is an *immaterial one.* Inadvertently we referred to

the Montgomery Ward & Co. letter of credit as calling for white granulated sugar. It called for Standard white sugar. This is an immaterial matter and does not in any way affect the facts in the case, as the Montgomery Ward sugar was accepted and paid for.

We call attention to the fact that the bank does not deny the following material assertions:

First: *That it was responsible for the loss that arose on the Sexton deal.*

Second: *That it at all times had knowledge of the interest of the International Trading Company in the transaction.*

Third: *That in establishing the letter of credit in the Orient, the bank dealt solely with Waterhouse & Company, and had no contractual relations with the International Company in that respect.*

This last mentioned fact being admitted, there is no foundation left for the theory of the court below that a partnership or joint adventure relation, or relation of principal and agent, existed between the International and Waterhouse & Company, for if such relation *had* existed, the bank would have had contractual relations with the International through the Waterhouse Company.

But from the fact that there was no such contractual relation defendant in error draws the conclusion that there were no legal relations between the bank and the International Trading Company by virtue of which the International had a right of action against the bank.

In coming to this conclusion defendant in error evidently overlooked the effect of the order given by the International to the bank which was approved by Waterhouse & Company, and the well-established principle that where two parties make an agreement for the benefit of a third party, such third party can sue upon such agreement. In this case, Waterhouse & Company and the bank made an agreement for the *express and sole benefit* of the International Trading Company, and by means of such agreement a sum of money amounting to two-thirds of $10,673.26 belonging to the International Trading Company came into the hands of the bank which it appropriated to its own use and denies that the International Trading Company has any interest in it.

The authorities are clear that under these circumstances the International Trading Company has a right of action against the bank.

"It is now the settled doctrine of so many of the states, that it may be called the American doctrine

Rea v. Barber, 135 Fed. 890.

Central Trust Co. v. Berwind, etc., 95 Fed. 391.

Gibson v. Victor Talking Machine Co., 232 Fed. 225.

Gooch v. Buford, 262 Fed. 894.

Austin v. Seligman, 18 Fed. 519.

Penn. Steel Co. v. N. Y. City Ry. Co., 198 Fed. 721, 749.

Constable v. Natl. Stemship Co., 154 U. S. 74.

German Alliance Co. v. Home Water Co., 226 U. S. 231.

In the case at bar, not only was the International *intended to be benefited*, but the contract was made for *its benefit as its object*, and it was the *sole beneficiary*. Furthermore, assets came to the hands of the bank which in equity belonged to the International.

The above authorities show that the International Trading Company had a right of action against the bank, under both the Washington and the Federal decisions, even if the order given by the International and approved by Waterhouse & Company had never been given to the bank. How

much stronger then is the right of the International when that order is also taken into consideration, for by that order Waterhouse & Company relinquished all possible claims it might have made to the two-thirds of the net profits of the Montgomery Ward & Company deal, and the record shows that the amount of these net profits have been definitely ascertained. (See Record, pp. 10 and 70.)

The Washington Supreme Court in *Moore v. Baasch*, *supra*, has also held as follows:

"The rule is, that the parties to an agreement made for the benefit of a third party, if accepted by that party, cannot themselves annul the contract by mutual releases."

We wish to call the court's attention to one more point in the brief of defendant in error. On page 17 of such brief it is asserted that "the plaintiff in error's position is:

"I claim that the bank by its negligence has damaged Waterhouse; I fix the damages at so much; Waterhouse owes my debtor; Waterhouse and the International need not even be heard in the matter; the bank may pay me."

That is not our position. We do not claim that the bank damaged Waterhouse. On the contrary, we claim that the bank damaged itself, and cannot

look to anyone else to make good that loss, and especially not to the International.

Respectfully submitted,

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